

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2004-005523-001 DT

06/13/2016

HON. SHERRY K. STEPHENS

CLERK OF THE COURT  
K. Shafer  
Deputy

STATE OF ARIZONA

RYAN PATRICK GREEN

v.

JOSHUA IDLEFONSO VILLALOBOS (001)

LAWRENCE S MATTHEW  
TERRY LYNN LOVETT BUBLIK

CAPITAL CASE MANAGER

RULING

The Court has considered the defendant's Motion to Preclude an Expanded Interpretation of A.R.S. § 13-752(G) as a Violation of Ex Post Facto Laws, the Separation [sic] of Powers, and Due Process, filed May 31, 2016 and the State's Response to Motion to Preclude Ex Post Facto Application of A.R.S. § 13-752(G) filed June 6, 2016. No reply was filed. At the status conference held on June 6, 2016, the parties agreed that oral argument was unnecessary and the Court could rule on the pleadings.

Defendant asserts that the Court should apply and follow A.R.S. § 13-703.01(G), the 2004 version of A.R.S. § 13-752(G), and case law interpreting it. He contends that failure to do so will violate (1) the constitutional (and statutory) proscription against *ex post facto* laws; (2) separation of powers; and (3) due process. The Court addresses each argument in turn.

*Ex Post Facto*

There is no dispute between the parties as to the substantive law: *ex post facto* laws are prohibited under both the federal and state constitutions. See U.S. CONST. art. I, § 10, cl. 1; ARIZ. CONST. art. II, § 25. For a law to be *ex post facto*, it must be retrospective, and it must disadvantage the affected offender. See *Weaver v. Graham*, 450 U.S. 24, 31 (1981). Procedural changes are not subject to the *ex post facto* prohibition. Accordingly, the threshold question is whether the amendments in issue are procedural or substantive.

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The Defendant is alleged to have committed first degree murder on or about January 4, 2004. At that time, A.R.S. § 13-703.01(G) read:

At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, the state may present any evidence that demonstrates that the defendant should not be shown leniency.

In 2012, the Arizona legislature amended A.R.S. § 13-752(G), effective August 2, 2012. The statute now reads:

At the penalty phase, the defendant and the state may present any evidence that is relevant to the determination of whether there is mitigation that is sufficiently substantial to call for leniency. In order for the trier of fact to make this determination, ***regardless of whether the defendant presents evidence of mitigation***, the state may present any evidence that demonstrates that the defendant should not be shown leniency ***including any evidence regarding the defendant's character, propensities, criminal record or other acts***.

(Changes in bold italics.)

Defendant urges that prior to the 2012 amendments, the Arizona Supreme Court had construed A.R.S. § 13-703.01(G) as requiring that the State's rebuttal evidence (that is, evidence against leniency) be relevant to the mitigation evidence presented by the defense. That contention, which underlies Defendant's argument as to the substantive as opposed to procedural nature of the amendments, is not supported by Arizona law. *See, e.g., State v. Nordstrom*, 230 Ariz. 110, 115, 280 P.3d 1244, 1249 (2012) (a defendant's failure to present mitigation evidence does not preclude the State from offering evidence against leniency) (distinguishing *State v. Boggs*, 218 Ariz. 325, 185 P.3d 111 (2008), and *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006)); *State v. Medina*, 232 Ariz. 391, 306 P.3d 48 (2013) (holding that applying A.R.S. § 13-752(G)(2009) to Medina's 1993 murder was not an *ex post facto* law; "the legal standard for sentencing a defendant to death has remained the same.").

The Court concludes, based on the relevant case law, that the amendments to A.R.S. § 13-752(G) do not alter the quality or nature of the evidence that the State may present against

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leniency during the penalty phase, and accordingly are procedural as opposed to substantive changes. Thus, the changes are not *ex post facto* as to Defendant.<sup>1</sup>

*Separation of Powers*

Defendant's contention that the amendments to A.R.S. § 13-752(G) constitute a violation of the separation of powers doctrine also is not well taken, as they do not expand "the admissibility of rebuttal evidence," and thus do not conflict with existing rules. Rather, the amendments codify existing case law, and accordingly are construed as an affirmation rather than a modification of that law. *See, e.g., State v. Bonillas*, 197 Ariz. 96, 97, 3 P.3d 1016, 1017 (App. 1999).

*Due Process*

Defendant argues that he will be deprived of a fundamentally fair proceeding if the State is allowed to present "unlimited evidence" in rebuttal to mitigation. The relevant case law recognizes that due process concerns constrain the introduction of evidence in the penalty phase. *See State v. Guarino*, 238 Ariz. 437, ¶15, 362 P.3d 484 (2015) (admission in penalty phase of co-defendant's statements regarding extent of defendant's participation in murder did not violate due process, where statements directly related to circumstances of crime, statements rebutted defendant's assertions that accomplice bore most of the responsibility for murder, and defendant knew about accomplice's statements from at least time of pretrial hearing); *State v. Martinez*, 230 Ariz. 208, ¶45, 282 P.3d 409 (2012) ("Although our Rules of Evidence do not apply to the penalty phase, §13-751(C), trial courts must exclude rebuttal 'evidence that is either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial.'" (citing *Hampton*)); *State v. Prince*, 226 Ariz. 516, 526 ¶17, 250 P.3d 1145, 1155 (2011) (observing that § 13-752(G) permits any evidence probative on whether the defendant should be shown leniency, subject only to due process limitations"). The Court intends to follow this case law. Thus, Defendant's argument is wholly speculative, as it is premised on the assumption that this Court will not act to limit evidence that is irrelevant or outside the scope of the proceeding. If Defendant believes that the State's presentation or the Court's rulings at the penalty phase proceeding are inappropriate, his remedy is to object at that time.

IT IS ORDERED denying Defendant's Motion to Preclude an Expanded Interpretation of A.R.S. § 13-752(G) as a Violation of Ex Post Facto Laws, the Separation [sic] of Powers, and Due Process.

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<sup>1</sup> For this reason, Defendant's argument against retroactivity under A.R.S. § 1-244 also is equally unavailing.